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No. 95-1698

In the Supreme Court of the United States

OCTOBER TERM, 1995

STRATTON GEORGOULIS, PETITIONER

v.

UNITED STATES OF AMERICA AND
ALLIED PRODUCTS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(3), as a person who arranged for a company's disposal of hazardous wastes, where he was the sole shareholder of the company's corporate parents, he acted as chief executive officer of the company, he exercised detailed and virtually absolute control over the company's operations, and he precluded his subordinates from exercising independent authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 68 F.3d 1082. The opinion of the district court (Pet. App. A27-A52) is reported at 866 F. Supp. 1173.

JURISDICTION

The court of appeals entered its decision on October 16, 1995, and it denied a petition for rehearing on January 3, 1996. Pet. App. A53. The petition for a writ of certiorari was filed on April 2, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States and Allied Products Corporation (Allied) sued petitioner and two corporate entities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601, *et seq.*, for recovery of response costs incurred in cleaning up hazardous substances dumped at the White Farm Equipment Dump Site in Charles City, Iowa. The district court entered partial summary judgment, holding that petitioner and the corporate entities are liable as "person[s] who * * * arranged for disposal" of hazardous substances under Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3). The district court certified the question for interlocutory appeal, 28 U.S.C. 1292(b), and the court of appeals affirmed the entry of summary judgment against petitioner. It reversed the entry of summary judgment against the corporate entities and remanded the case for further factual development with respect to their liability.

1. CERCLA creates a comprehensive federal program for cleaning up inactive hazardous waste disposal sites. See *Key Tronic Corp.* v. *United States*, 114 S. Ct. 1960, 1964 (1994). Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604. Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue

orders to compel liable persons to respond to releases or threats of release, 42 U.S.C. 9606, while Section 107 allows the United States to recover its response costs from liable parties, 42 U.S.C. 9607.

2. White Farm Equipment Company (WFE) owned and operated a farm equipment manufacturing plant in Charles City, Iowa. From the early 1970s to 1985, WFE dumped foundry wastes containing hazardous substances at a disposal site owned by H.E. Construction Company (HEC). In 1988, the EPA listed that facility, commonly known as the White Farm Equipment Dump Site, on the NPL. See 40 C.F.R. Part 300, App. B. (1993). The United States, acting pursuant to its authority under CERCLA, and Allied, which purchased WFE in 1985, have spent considerable sums in responding to the release and threats of release of hazardous substances at the site. They brought separate actions under Section 107 of CERCLA to recover appropriate portions of those response costs from petitioner and related corporate entities, who had previously controlled WFE's operations. Pet. App. A1-A3, A27-A28.

3. The United States and Allied moved for partial summary judgment against petitioner and two related corporate entities, arguing, among other things, that those parties were liable under Section 107 of CERCLA because, from 1980 to 1985, they had arranged for the disposal of WFE's foundry wastes at the White Farm Equipment Dump Site. See CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3). The United States and Allied based their liability claims on the virtually complete control that petitioner and the related companies had exercised over WFE during the period in question. See Pet. App. A31-A33, A36-A37.

From 1980 to 1985, petitioner was the president, chairman, and sole shareholder of two investment holding companies, TIC Investment Corporation (TICI), and TIC United Corporation (TICU). In 1980, TICI purchased White Farm Industries, Inc. and White Farm U.S.A., which were holding companies for WFE. In 1981, TICI transferred ownership of WFE to TICU. From 1980 to 1985, petitioner served as chairman of the board of WFE. He also served as president of WFE, temporarily relinquishing that role to two persons who nominally served as presidents until petitioner fired them. Pet. App. A2-A5, A28-A31, A39-A40.

WFE's bylaws gave petitioner, as president, authority over the general management and control of the business and affairs of the company. Pet. App. A4, A40. Additionally, at all relevant times, petitioner did in fact exercise direct control over the ongoing operations and management of WFE. For example, he "talked daily, if not several times a day," with WFE's managers, he continuously received reports about the company's activities, he had final authority over WFE's management meetings, and he personally made significant changes respecting WFE's finances, contracts, operations, manpower, and employee benefits. See *id.* at A4-A5, A41-A43.

4. The district court granted partial summary judgment against petitioner, TICI, and TICU, holding that they were all liable as "arrangers for disposal" of hazardous substances at the White Farm site. Pet. App. A36-A51. The district court concluded that "[d]ue to [petitioner's] authority to control WFE and his actual exercise of control over WFE, he is directly liable as an arranger under CERCLA." *Id.* at A43. The court concluded that TICI and TICU

were similarly liable because of their "level of active involvement * * * in the affairs of WFE." *Id.* at A51.

5. The court of appeals affirmed in part and reversed in part the district court's grant of summary judgment. Pet. App. A1-A26. It held that "the proper standard to be applied in this case imposes direct arranger liability on a corporate officer or director if he or she had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances." Pet. App. A17.

The court concluded that petitioner was liable as an arranger under that standard, stating:

> In the present case the undisputed facts reveal that [petitioner] did not simply delegate authority and rely on the judgment of others; as a practical matter, his mandates left no room for others to exercise any decisionmaking authority or judgment in any area of the business, including hazardous waste disposal.

Id. at A19. The court determined that petitioner's actions had "inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite," *id.* at A20, finding it "beyond dispute" that

> [petitioner], in his capacity as board chairman and chief executive officer of WFE, so usurped the power of those who were only nominally running WFE that he undertook responsibility for all of WFE's decisionmaking; he so tightly controlled WFE, particularly its budgetary aspects, that he left WFE employees no other choice but to continue with the relatively inexpensive arrangement

> that had historically existed between WFE and HEC.

Id. at A19 (footnote omitted). The court rejected petitioner's argument that he should be absolved of liability because he was not personally involved in the waste disposal decisions, stating that "[t]he lack of evidence showing that [petitioner] was personally involved in, or aware of, the details of the disposal arrangement does not bar his liability." *Id.* at A20.

The court of appeals applied a similar standard in determining whether TICI and TICU were liable as arrangers. See Pet. App. A23-A24. It concluded that there may be material issues of fact bearing on their liability and therefore reversed the district court's grant of summary judgment against them. See *id.* at A24-A26.

ARGUMENT

Petitioner asserts that the court of appeals erred in upholding the district court's finding that he was liable under CERCLA, in the absence of evidence that he either intended to or did personally participate in arranging for the disposal of hazardous substances. The court of appeals correctly rejected that contention. Its decision does not conflict with any decision of this Court or another court of appeals, and it raises no issue warranting this Court's review.

1. As petitioner concedes (Pet. 9), CERCLA imposes strict liability on specified categories of persons for the costs of responding to the release or threatened release of hazardous substances. See CERCLA § 107(a), 42 U.S.C. 9607(a). As petitioner also concedes (Pet. 9), the potentially responsible parties include any person who "arranged for disposal or treatment" of the hazardous substances.

CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3). See, *e.g.*, Pet. App. A7-A8; *United States* v. *Vertac Chem. Corp.*,, 46 F.3d 803 (8th Cir. 1995), cert. denied, 115 S. Ct. 2609 (1995); *Jones-Hamilton Co.* v. *Beazer Materials & Services*, 973 F.2d 688 (9th Cir. 1992); *Florida Power & Light* v. *Allis Chalmers*, 893 F.2d 1313 (11th Cir. 1990); *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989).

The "precise" issue here is whether petitioner is liable under CERCLA as an "arranger" based on his virtually complete and actual control over WFE's operations, which "inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite." Pet. App. A8, A19-A20. Petitioner contends that he is not liable because he took no "intentional acts" respecting WFE's disposal activities (Pet. 9-10) and exercised "mere indirect control" over that aspect of WFE's business (Pet. 10-13). He contends that he could not be liable as an arranger without "personal knowledge or involvement" in the waste disposal decisions. Pet. 13-18.

The court of appeals carefully considered and correctly rejected those contentions. Pet. App. A10-A17. The court concluded that arranger liability "requires some level of actual participation in, or exercise of control over, activities that are causally connected" to the waste disposal. *Id.* at A12. But it "does not impose the specific intent requirement urged by [petitioner]," which would insulate from liability those "who effectively dictate [a company's] hazardous waste decisions through day-to-day strict control of budgets, production, and capital investment." *Id.* at A17.

The court of appeals' ruling is consistent with CERCLA's language, which imposes liability on any

person who "by contract, agreement, *or otherwise*" arranges for disposal of hazardous substances. CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3) (emphasis added). That language reaches a person, such as petitioner, who had actual authority over "practically every major aspect of WFE's operations" (Pet. App. A16) and who "so tightly controlled" the company's financial outlays that he left "WFE employees no other choice but to continue" the improper disposal practices. Pet. App. A16, A19-A20. See also *id.* at A19-A20 n.8 (citing record evidence that petitioner "completely dominated all of the decisionmaking at WFE" and issued "strict instructions not to increase WFE's costs and to do everything possible to reduce costs across the board").

The court of appeals' decision is also consistent with CERCLA's fundamental objective of placing "the ultimate responsibility for clean up on 'those *responsible* for problems caused by the disposal of chemical poisons.'" Pet. App. A16. Petitioner's proposed requirement of "personal involvement" would create "a loophole for powerful individuals like [petitioner]." Pet. App. A15-A16. A corporate officer "who knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, could avoid CERCLA liability," while the person "making the disposal arrangements —even if he or she had no meaningful decisionmaking authority—could *not* avoid personal liability." *Id.* at A16.

2. Petitioner is mistaken in suggesting (Pet. 6-7) that the court of appeals' decision in this case conflicts with the Second Circuit's decision in *General Electric Co.* v. *AAMCO Transmission, Inc.*, 962 F.2d 281, 287 (1992), and the Seventh Circuit's decision in

Amcast Industries Corp. v. *Detrex Corp.*, 2 F.3d 746 (1993), cert. denied, 114 S. Ct. 691 (1994).

In *General Electric*, the Second Circuit concluded that the terms of a contractual relationship between completely unrelated companies were insufficient to make one of them an arranger for disposal as a result of actions taken by the other. 962 F.2d at 286-288. The court noted that "[a]lthough arranger liability can attach to 'parties that do not have active involvement regarding the timing, manner or location of disposal,' there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *Id.* at 286 (citations omitted). The court suggested that the absence of "actual exercise of management authority" by one over the other was relevant. *Id.* at 287 n.4.

The court of appeals in this case expressly drew upon *General Electric*'s "nexus" requirement in analyzing the degree of participation or personal knowledge required to impose liability. Pet App. A12 n.4. It held, in accordance with the Second Circuit's decision, that "a finding of arranger liability requires some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal" or off-site disposal of hazardous substances. *Id.* at App. A12. Here, the degree of management authority exercised by petitioner amply satisfies the Second Circuit's nexus requirement. See *Id.* at A19-A20 & n.8. Hence, there is no conflict between *General Electric* and this case.

In *Amcast*, the Seventh Circuit held that a shipper that had hired another company to deliver hazardous goods was not liable as an arranger for disposal when the company it hired inadvertently spilled some of the

goods at the delivery destination. 2 F.3d at 751. The court of appeals in this case concluded that *Amcast* "does not support" petitioner's position, noting that the release in that case had occurred through an accidental spill and there accordingly was "no arrangement" for that "disposal." Pet. App. 10, n.3. The court contrasted the situation presented here, where there was a specific arrangement between WFE and HEC for disposal of WFE's wastes at the dump site. Petitioner notes (Pet. 8, 10)) that the *Amcast* decision states that the words "arranged for" "imply intentional action." 2 F.3d at 751. But given the significantly different factual situations, that observation (made in the context of an inadvertent spill by a separate entity) does not give rise to a conflict between *Amcast* and the court of appeals' decision here.

3. There is no merit to petitioner's policy-based contentions (Pet. 7, 20-21) that the court of appeals' holding will subject "every chief executive officer of every corporation" to "virtually unlimited personal liability." The court based its decision "upon a fact-intensive examination of the totality of the circumstances," which demonstrated that petitioner had in fact exercised "substantial indirect control over the disposal arrangement." Pet. App. A20. As the court of appeals recognized, its holding is narrow and limited to the facts of this case: "Had [petitioner] truly delegated authority to others and allowed those individuals to exercise their judgment with respect to WFE's waste disposal practices without his interference, he would not be liable under the standard we have adopted today." *Id.* at A19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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